

Second Regular Session
Sixty-eighth General Assembly
STATE OF COLORADO

PREAMENDED

*This Unofficial Version Includes Committee
Amendments Not Yet Adopted on Second Reading*

LLS NO. 12-0103.02 Thomas Morris x4218

SENATE BILL 12-097

SENATE SPONSORSHIP

Hodge,

HOUSE SPONSORSHIP

(None),

Senate Committees

Agriculture, Natural Resources, and Energy

House Committees

A BILL FOR AN ACT

101 **CONCERNING A SIMPLIFIED PROCEDURE FOR THE ADJUDICATION OF**
102 **CERTAIN CHANGES OF THE POINTS OF DIVERSION OF WATER**
103 **RIGHTS.**

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at <http://www.leg.state.co.us/billsummaries>.)

Under current law, all changes of water rights, including changes in the point of diversion, must be adjudicated. The bill creates a simplified procedure for the adjudication of a simple change in a surface point of diversion, which is defined as a change in the point of diversion

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

from a decreed surface diversion point that is not combined with and does not include any other type of change of water right and for which there is no intervening surface diversion point or inflow from a surface stream or other surface discharge between the new point of diversion and the diversion point from which a change is being made. The new procedure applies to a change of point of diversion that has already been physically accomplished or with respect to a requested future change of point of diversion.

There is a rebuttable presumption that a simple change in a surface point of diversion will not cause an enlargement of the historical use associated with the water rights being changed. The resulting decree must not requantify the water rights for which the point of diversion is being changed. The applicant is not required to prove:

- ! That the water diverted at the new point of diversion can and will be diverted and put to use within a reasonable period of time;
- ! Compliance with the anti-speculation doctrine; or
- ! Future need for the water or other similar requirements imposed by case law or statute.

1 *Be it enacted by the General Assembly of the State of Colorado:*

2 **SECTION 1.** In Colorado Revised Statutes, 37-92-305, **add** (3.5)
3 as follows:

4 **37-92-305. Standards with respect to rulings of the referee and**
5 **decisions of the water judge. (3.5) Applications for a simple change**
6 **in a surface point of diversion. (a) FOR PURPOSES OF THIS SUBSECTION**
7 **(3.5):**

8 (I) "INTERVENING SURFACE DIVERSION POINT OR INFLOW" MEANS
9 ANY DITCH DIVERSION OR OTHER POINT OF DIVERSION FOR A DECREED
10 SURFACE WATER RIGHT, POINT OF REPLACEMENT OR POINT OF DIVERSION
11 BY EXCHANGE THAT IS PART OF AN EXISTING DECREED EXCHANGE, WELL
12 OR WELL FIELD THAT IS DECREED TO OPERATE AS A SURFACE DIVERSION,
13 OR POINT OF INFLOW FROM A TRIBUTARY SURFACE STREAM.

14 (II) "SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION" MEANS

1 A CHANGE IN THE POINT OF DIVERSION FROM A DECREED SURFACE
2 DIVERSION POINT TO A NEW SURFACE DIVERSION POINT THAT IS NOT
3 COMBINED WITH AND DOES NOT INCLUDE ANY OTHER TYPE OF CHANGE OF
4 WATER RIGHT AND FOR WHICH THERE IS NO INTERVENING SURFACE
5 DIVERSION POINT OR INFLOW _____ BETWEEN THE NEW POINT OF
6 DIVERSION AND THE DIVERSION POINT FROM WHICH A CHANGE IS BEING
7 MADE. "SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION" DOES NOT
8 INCLUDE A CHANGE OF POINT OF DIVERSION FROM BELOW OR WITHIN A
9 STREAM REACH FOR WHICH THERE IS A DECREED IN-STREAM FLOW RIGHT
10 TO AN UPSTREAM LOCATION WITHIN OR ABOVE THAT REACH.

11 (b) (I) AN APPLICATION FOR A SIMPLE CHANGE IN A SURFACE POINT
12 OF DIVERSION IS SUBJECT TO ALL PROVISIONS OF THIS ARTICLE, INCLUDING
13 SECTIONS 37-92-302 TO 37-92-305, EXCEPT AS SPECIFICALLY MODIFIED BY
14 THIS SUBSECTION (3.5).

15 (II) THE PROCEDURES IN THIS SUBSECTION (3.5) APPLY ONLY TO A
16 SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION AND DO NOT CHANGE
17 THE PROCEDURES OR LEGAL STANDARDS APPLICABLE TO ANY OTHER
18 CHANGE OF WATER RIGHT.

19 (III) AN APPLICATION FOR A SIMPLE CHANGE IN A SURFACE POINT
20 OF DIVERSION MAY:

21 (A) BE MADE WITH RESPECT TO A CHANGE OF POINT OF DIVERSION
22 THAT HAS ALREADY BEEN PHYSICALLY ACCOMPLISHED OR WITH RESPECT
23 TO A REQUESTED FUTURE CHANGE OF POINT OF DIVERSION;

24 (B) BE MADE WITH RESPECT TO AN ABSOLUTE WATER RIGHT OR A
25 CONDITIONAL WATER RIGHT; AND

26 (C) INCLUDE ONE OR MORE WATER RIGHTS THAT ARE TO BE
27 DIVERTED AT THE NEW POINT OF DIVERSION. THE APPLICATION MUST NOT

1 INCLUDE OR BE CONSOLIDATED OR JOINED WITH AN ACTION BY THE
2 APPLICANT SEEKING ANY OTHER TYPE OF CHANGE OF WATER RIGHT OR
3 DILIGENCE PROCEEDING OR APPLICATION TO MAKE ABSOLUTE WITH
4 RESPECT TO THE WATER RIGHT OR RIGHTS INCLUDED IN THE APPLICATION.

5 (c) THE APPLICANT BEARS THE INITIAL BURDEN IN AN APPLICATION
6 FOR A SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION TO PROVE,
7 THROUGH THE IMPOSITION OF TERMS AND CONDITIONS IF NECESSARY,
8 THAT THE SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION WILL NOT:

9 (I) RESULT IN DIVERSION OF A GREATER FLOW RATE OR AMOUNT
10 OF WATER THAN HAS BEEN DECREED TO THE WATER RIGHT AND, WITHOUT
11 REQUANTIFYING THE WATER RIGHT, IS PHYSICALLY AND LEGALLY
12 AVAILABLE AT THE DIVERSION POINT FROM WHICH A CHANGE IS BEING
13 MADE; OR

14 (II) INJURIOUSLY AFFECT THE OWNER OF OR PERSONS ENTITLED TO
15 USE WATER UNDER A VESTED WATER RIGHT OR A DECREED CONDITIONAL
16 WATER RIGHT.

17 (d) IF THE APPLICANT MAKES A PRIMA FACIE SHOWING WITH
18 RESPECT TO THE MATTERS IN PARAGRAPH (c) OF THIS SUBSECTION (3.5),
19 THE CASE PROCEEDS AS A SIMPLE CHANGE IN A SURFACE POINT OF
20 DIVERSION, THE APPLICANT HAS THE BURDEN OF PERSUASION WITH
21 RESPECT TO THE ELEMENTS OF ITS CASE, INCLUDING THE MATTERS IN
22 PARAGRAPH (c) OF THIS SUBSECTION (3.5), AND THE STANDARDS OF
23 PARAGRAPH (e) OF THIS SUBSECTION (3.5) APPLY. IF THE APPLICANT DOES
24 NOT MAKE SUCH A PRIMA FACIE SHOWING, THE REFEREE OR WATER JUDGE
25 SHALL DISMISS THE APPLICATION WITHOUT PREJUDICE TO THE APPLICANT'S
26 FILING AN APPLICATION FOR A CHANGE OF WATER RIGHT THAT IS NOT A
27 SIMPLE CHANGE IN A SURFACE POINT OF DIVERSION.

1 (e) THE FOLLOWING STANDARDS APPLY TO A SIMPLE CHANGE IN A
2 SURFACE POINT OF DIVERSION:

3 (I) THERE IS A REBUTTABLE PRESUMPTION THAT A SIMPLE CHANGE
4 IN A SURFACE POINT OF DIVERSION WILL NOT CAUSE AN ENLARGEMENT OF
5 THE HISTORICAL USE ASSOCIATED WITH THE WATER RIGHTS BEING
6 CHANGED;

7 (II) THE DECREE MUST NOT REQUANTIFY THE WATER RIGHTS FOR
8 WHICH THE POINT OF DIVERSION IS BEING CHANGED.

9 (III) THE APPLICANT IS NOT REQUIRED TO:

10 (A) PROVE THAT THE WATER DIVERTED AT THE NEW POINT OF
11 DIVERSION CAN AND WILL BE DIVERTED AND PUT TO USE WITHIN A
12 REASONABLE PERIOD OF TIME;

13 (B) PROVE COMPLIANCE WITH THE ANTI-SPECULATION DOCTRINE;
14 OR

15 (C) PROVIDE OR MAKE A SHOWING OF FUTURE NEED IMPOSED
16 BY THE CASES OF *PAGOSA AREA WATER AND SANITATION DISTRICT V. TROUT*
17 *UNLIMITED*, 219 P.3d 774 (COLO. 2009) OR *CITY OF THORNTON V. BIJOU*
18 *IRRIGATION CO.*, 926 P.2d 1 (COLO. 1996).

19 **SECTION 2. Applicability.** The provisions of this act apply to
20 applications for simple changes in a surface point of diversion filed on or
21 after the effective date of this act.

22 **SECTION 3. Safety clause.** The general assembly hereby finds,
23 determines, and declares that this act is necessary for the immediate
24 preservation of the public peace, health, and safety.